

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MANUFACTURERS AND TRADERS	:	<b>CIVIL NO. 1:10-CV-2175</b>
TRUST CO.,	:	
	:	(Magistrate Judge Smyser)
Plaintiff	:	
	:	
v.	:	
	:	
HUGH P. FULMER, M.D. and	:	
EVANGELINE FULMER, d/b/a	:	
NAPLES MED SPA & WELLNESS and	:	
HUGH P. FULMER, M.D. and	:	
EVANGELINE FULMER,	:	
	:	
Defendants	:	

**MEMORANDUM AND ORDER**

The defendants have filed a motion to dismiss the complaint pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure for lack of personal jurisdiction. They argue that they do not have minimal contacts with Pennsylvania.

However, the plaintiff asserts that the agreement contains two clauses in which the parties to the agreement agreed that the lease is to be governed and construed in accordance with the laws of the Commonwealth of Pennsylvania and that any actions or proceedings to which the lessor is a

party arising from the lease shall be litigated at the lessor's option in Pennsylvania and that the courts of Pennsylvania will have jurisdiction over such litigation.<sup>1</sup>

The plaintiff has presented a document to the court in opposition to the motion to dismiss the complaint. The defendants have not filed a reply brief in support of the motion to dismiss the complaint. The defendants stated in their motion to dismiss the complaint and in the affidavit of Evangeline Fulmer in support of the motion to dismiss the complaint that the defendants received and signed a one page contract. Evangeline Fulmer states under penalty of perjury that she never received any second page to the contract. The plaintiff presents a copy of a second page which, the plaintiff asserts, bears the initials of Evangeline Fulmer.

The form lease agreement is a two page form lease agreement. "Page 1 Of 2" contains the admonition "SEE PAGE TWO

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1. Paragraph 30, page 2, Doc. 7-1. It is stated also on page one of the agreement that the guarantor consents to the in personam jurisdiction of Pennsylvania state and federal courts.

FOR ADDITIONAL TERMS AND CONDITIONS WHICH ARE PART OF THIS LEASE” and is numbered “Page 1 Of 2”. The language in ¶ 30 on page 2 provides that the plaintiff could choose to bring a civil action in a Pennsylvania court or a federal court in Pennsylvania, that such court was agreed by the parties to have jurisdiction and that Pennsylvania law would be applicable in the event of a dispute.

The issues raised by the defendants involve the authenticity of the two page agreement, whether defendant Evangeline Fulmer initialed page 2 and whether a forum selection clause should be enforced. These issues will not be finally adjudicated on the defendants’ motion to dismiss. Issues of fact are presented. However, based upon what is presented at this point, the complaint will not be dismissed.

Based upon what is presently before the court, it can not be concluded that the forum selection agreement the contract should not be enforced. The lessor, Court Square Leasing Corporation, presented to the defendants a Lease Agreement that on page one stated a Pennsylvania address for

the lessor and that on pages one (just above the defendants' signatures) and two contained a forum selection clause selecting a Pennsylvania forum. The plaintiff in its brief states that Court Square, acquired by the plaintiff M&T Trust on May 29, 2009, was a Pennsylvania based leasing company.

Forum selection clauses are presumptively valid and are enforceable unless it can be established "(1) that it is the result of fraud or overreaching, (2) that enforcement would violate a strong public policy of the forum, or (3) that enforcement would in the particular circumstances of the case result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable." *Coastal Steel Corp. v. Tilghman Wheenabrator Ltd.*, 709 F.2d 190, 202 (3d Cir. 1983), overruled on other grounds by, *Lauro Lines v. Chasser*, 490 U.S. 495 (1989); see *Jumara*, 55 F.3d at 880. "The party opposing a forum selection clause bears a 'heavy burden' of showing that the clause should not be enforced." *CQ, Inc. v. TXU Mining Co.*, No. 05-1230, 2006 WL 278155, at \*2 (W.D. Pa. 2006) (citing *MoneyGram Payment Sys. v. Consorcio Oriental, S.A.*, 65 Fed. App'x 844, 848 (3d Cir. 2003)).

*Frazetta v. Underwood Books*, 2009 U.S. Dist. LEXIS 29310, at \*9 (M.D. Pa. April 6, 2009).

The defendants do not come forward with a reason for the court not to enforce the forum selection clause that is based upon fraud, overreaching by the lessor or public policy. The defendants contend that for them Pennsylvania is a jurisdiction so seriously inconvenient as to be unreasonable.

Although the defendants in their brief assert that it is "the poor quality of the Defendants spa machine which forms the basis of this case" (Doc. 6, page 6), there is not anything presented in the pleadings to support that characterization of the case. The complaint states a claim for past due sums under a lease agreement and liquidated damages. The defendants do not present a persuasive showing that the litigation of this claim in Pennsylvania will be seriously and unreasonably inconvenient.

The defendants' motion to dismiss the complaint will accordingly be denied.

**IT IS ORDERED** that the defendants' motion (Doc. 2) to dismiss the complaint is **DENIED**.

**/s/ J. Andrew Smyser**  
J. Andrew Smyser  
Magistrate Judge

Dated: January 7, 2011.